

No. 22,752 ✓

United States Court of Appeals
For the Ninth Circuit

FISHEL PRODUCTS Co., a copartnership consisting of Edward R. Fishel and John D. Fishel,

Appellant,

vs.

COMMODITY CREDIT CORPORATION, AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE and UNITED STATES OF AMERICA,

Appellees.

BRIEF OF APPELLANT

CREEDE, DAWSON & GILLASPY,

By FRANK J. CREEDE, JR.,

2409 Mercad Street, Suite 4,

Fresno, California 93721,

Attorneys for Appellant.

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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Jurisdiction rests in the United States District Court, for the Eastern District of California, by virtue of the fact that the contract between the parties was to be performed at Kingsburg, California, and this is a suit against a corporation of the United States of America.

28 U.S.C. 1291 provides:

“The courts of appeals shall have jurisdiction of appeals from all final decisions of the district

courts of the United States . . . except where a direct review may be had in the Supreme Court.”

STATEMENT OF THE CASE

Suit has been filed by Fishel Products Company, a small food processing firm in Kingsburg, California, against Commodity Credit Corporation to recover \$26,630.50, the contract price for various shipments of bulgur which was processed by Fishel Products Company at its plant in Kingsburg, accepted by Commodity Credit Corporation, and shipped to Saigon, Viet Nam. Appellant's First Amended Complaint also seeks damages in the amount of \$116,145.88 for wrongful termination of contract. The first and second causes of action are based on the premise that a direct right of action exists for breach of contract since the contract was terminated in mid-term. Appellant asserts the Wunderlich Act (41 U.S.C. 321-322) is not controlling because the subject matter was not a “dispute arising under this contract”, under Article 39 of the Contract providing that “any dispute concerning a question of fact arising under this contract” shall be decided by the Contracting Officer or Designee of the Agency.

The third cause of action asserts that the decision of the Contract Disputes Board is not binding because Appellant has new evidence which was not presented at the hearing before the Board with respect

to the grossly excessive counterclaim for wheat which was sold at private sale when it could have been salvaged and cleaned at nominal cost on the basis which the Commodity Credit Corporation failed to properly mitigate damages.

The third and fourth causes of action allege that the wheat could have been reconditioned for a nominal charge and instead of reconditioning it, Commodity Credit Corporation sold the wheat and tried to use the price received at a private sale as a measure of its damages.

The fifth cause of action sets forth that the counterclaim of \$159,967.07 was presented for the first time on the second day of a four-day hearing before the Contract Disputes Board. Plaintiff objected to the presentation of the claim at the hearing of the Board, and it was prevented from preparing for and submitting evidence on the counterclaim, and the issues raised thereby were to be separated and reserved for a later decision which was subsequently rendered by the Board without an opportunity on the part of Plaintiff to submit evidence on the counterclaim at an open hearing.

The decision of the Contract Disputes Board, using private sales of the wheat as the measure of damages rather than the nominal cost to reclean and salvage the wheat, was so erroneous as to imply bad faith.

The decision of the Contract Disputes Board was arbitrary in that the counterclaim for \$159,967.07 was presented for the first time on the second day of a

four-day hearing before the Contract Disputes Board, Plaintiff had not been previously advised of such counterclaim and the Board did not allow Appellant an adequate opportunity to prepare for the issues raised by the counterclaim. Such action by the Board was arbitrary and capricious and implied bad faith.

Appellant was not allowed the right to answer and litigate the counterclaim presented by defendant, was assured by the Contract Disputes Board it would have an opportunity to answer and litigate these claims, and that denial of this opportunity was so arbitrary and capricious as to imply bad faith.

Defendant, Commodity Credit Corporation, moved the Court for Summary Judgment under Rule 56 on the ground that the decision of the Board was supported by substantial evidence and is *final and conclusive* on the rights of the parties. The District Court granted Summary Judgment in favor of defendant on the sole basis that the decision of the Board was supported by substantial evidence and the decision was not procured by fraud.

Page 19 of the Decision of the Contract Disputes Board states:

“Attorney for CCC at the end of his opening statement sought to serve on the Petitioner the Contracting Officer’s findings of fact and a determination of the amount of damages claimed by CCC against Petitioner resulting from failure of performance under the contracts. A copy of the findings and the determination together with

supporting documents was offered in evidence to support the Contracting Officer's computation of the CCC claim. Petitioner's attorney objected to this procedure on the grounds that it was too late for Petitioner to meet the claim for these damages at this hearing. After hearing both attorneys on the question, the Board refused to admit the damage claim into evidence at that time and held in abeyance its ruling as to whether it would be accepted in evidence at the hearing. (Tr. p. 20). Later, on the third day of the hearing, the Presiding Officer ruled that in the interest of disposing of this entire matter as promptly as possible CCC's claim would be admitted into the record. . . ."

The Declaration of John D. Fishel sets forth that Balfour-Guthrie Company subsequently negotiated for resale the salvaged grain after cleaning. The Declaration shows that the grain was reconditioned at a nominal charge and the measure of damages, if any, as a matter of law, should have been the reconditioning costs. The Declaration of John D. Fishel states that the counterclaim was not presented until the second day of a four-day hearing, which is supported by the record of the Contract Disputes Board. The Declaration states, and the Board's own findings indicate, that the Petitioner was not permitted to prepare for its defense on the counterclaim, and that the Fishel Products Company had been assured by the Contract Disputes Board that there would be an opportunity to litigate the very substantial issues raised by the \$159,967.07 counterclaim.

ISSUES

1. Is the Wunderlich Act, requiring an administrative determination under the "disputes" clause of the Contract, applicable to a contract which is terminated for alleged default shortly after its inception.

2. Does finality attach to decisions of law made by the Contract Disputes Board.

3. Did the Disputes Board act capriciously and arbitrarily so as to imply bad faith in asserting a \$159,967.07 claim for the first time after the commencement of the hearing and in failing to give Appellant an opportunity to prepare for and present evidence on said issue at an open hearing.

4. Whether the District Court has failed to review the decisions of law made by the Contract Disputes Board.

5. Whether an issue of fact exists which requires a reversal of the Summary Judgment granted by the District Court.

ARGUMENT

THE WUNDERLICH ACT, REQUIRING AN ADMINISTRATIVE DETERMINATION UNDER THE "DISPUTES" CLAUSE OF THE CONTRACT, IS NOT APPLICABLE TO A CONTRACT WHICH IS TERMINATED FOR ALLEGED DEFAULT SHORTLY AFTER ITS INCEPTION.

Plaintiff, Fishel Products Company, filed this action for damages based on a *terminated* contract. This case does not stem from a dispute under a performed contract, but one which was terminated by Commodity Credit Corporation for alleged default shortly after its inception and prior to completion. Article 39 of the Standard Specifications of the contract provides:

"Except as may otherwise be provided in the contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the contracting officer, or designee of agency . . ."

The distinction is recognized between a dispute "arising under this contract" and a cause of action for damages on a terminated contract. In *Compudync Corporation v. Maxon Construction Co.*, 248 Fed. Supp. 83, the Court stated, at page 85:

"Once the contract has been terminated as occurred here, it no longer exists and there can be no 'factual dispute' under it."

" . . . In addition, there is no hint whatsoever from the remainder of the disputes clause that it encompasses factual issues that exist after the contract ceases to exist.

"Secondly, the purpose of the disputes clause is to expedite performance of the contract and to

avoid initial resort to the Courts with the resultant delay, expense and likely aggravation of damages. Determination of factual disputes by the Contracting Officer can often lead to a quick and satisfactory resolution of issues and completion of the contract with minimum of lost time and money.

“However, once the contract has been terminated pursuant to its termination clause, the duties of the parties to perform have come to an end. No longer is there any need for a quick resolution of issues since one party, relying on a contractual provision, has discharged the other of any responsibility. While the discharging party may still be liable in damages for breach of contract, the position of the parties is fixed, and the terminating party is free to find someone else to complete the contract. A dispute clause is designed to expedite the completion of a contract, but once the parties have come to the point where one has terminated the contract, no useful purpose exists to hold things in abeyance since a decision of the Contracting Officer in favor of the non-terminating party does not re-institute the contract under any of its provisions that this court has read. Consequently, where the contract has been terminated, the rationale of the disputes clause ceases to exist.”

Similarly, in *E. I. du Pont de Nemours & Co. v. Lyles & Lang Construction Co.*, 219 Fed. 2d 328, the Court stated, at page 333:

“We think it clear that the trial Judge correctly refused to hold the action barred for failure to proceed under the clause or to limit the issues in

the case by excluding all issues of fact. In the first place, we do not think that the disputes clause has any application to a case such as this. . . ."

"... The disputes clause was evidently intended to furnish a ready means of administrative settlement of questions arising during the performance of the contract which might delay or interfere with performance, not to provide for unilateral determination of the amount due under the contract upon its termination."

In *United States v. Duggan*, 210 Fed. 2d 926, Eighth Circuit, March, 1954, a contract between the Government and a contractor was terminated by default of the contractor. The United States asserted a claim of \$1,700,000.00 against the contractor. The defendant asserted that as a condition precedent to the filing of suit for damages, the United States was required to comply with the terms of the "Disputes" clause of the contract for the administrative determination of claims.

In holding that on a terminated contract the District Court had jurisdiction to entertain the claim, the Court stated, at page 932:

"We do not find in the contract any agreement between the parties for the administrative determination of the claims of the Government against the Contractor upon the termination of the contract. Even if there has been in the contract no express reservation of claims in favor of the Government against the Contractor, we think the Contractor would not be relieved from

liability to the Government for any loss proximately resulting from the failure of the Contractor to perform its obligations under the contract or its legal obligation to reimburse the Government for moneys received by the Contractor to which it was not entitled.

"The District Court's conclusion that it was without jurisdiction to entertain the claim of the Government in advance of an administrative determination of the amount justly due upon the termination of the contract, we think is not logically tenable. . . . The Government was, in our opinion, entitled to have its claim against the Contractor judicially determined."

And further:

". . . Obviously, we think this Article provided for nothing more than an administrative determination of questions of fact which might arise during the course of the performance of the contract and prior to its termination."

The Court held that matters of this complexity should not be determined on summary judgment, stating, at page 933:

"This was not the kind of a controversy which properly could be terminated by dismissing the Government's claim. Complicated and doubtful issues of fact and law can seldom be satisfactorily determined by dismissing a pleading for insufficiency of statement.

". . . The issues raised by the Government's claim and the objection of the trustee should have been determined after a trial and after affording

each of the parties a full opportunity to introduce any and all evidence which has any bearing on those issues."

To the same effect is *United States v. Heaton*, 195 Fed. Supp. 742, where the Court stated, in denying summary judgment under similar facts, at page 745:

"For the reasons that the disputes clause applies neither to controversies arising after the termination of the contract nor to actions for breach of contract the Court holds that the findings of fact made pursuant to the disputes clause are not final and binding in this action, and Plaintiff's motion for partial summary judgment is denied."

In *Silberblatt & Lasher, Inc. v. United States*, 1944, 101 Sup. Ct. 54, at page 81, the Court said:

"Such a dispute (breach of contract) the Contracting Officer is not authorized to decide finally; his authority is limited to disputes arising under the contract; it does not extend to disputes over a breach of the contract."

In *Boomer v. Abbott*, 1953, 121 Cal. App. 2d 449, 263 Pac. 2d 476, the Court held that a disputes clause was not applicable to questions arising out of a breach of contract. Citing numerous cases the Court said, at page 462:

"The cases interpreting federal contracts have clearly established that actions that amount to an actual breach of the contract are not covered by the 'disputes' article."

263 Pac. 2d 476, at page 484.

In *Continental Illinois National Bank & Trust Co. v. United States*, 101 Fed. Supp. 755, certiorari denied 343 U.S. 963 (72 Sup. Ct. 1057, 96 L. Ed. 1361), it was held that claims for unliquidated damages for breach of contract are not proper subjects of departmental adjudication. See also *Peter Kiewit Sons Co. v. United States*, 74 Fed. Supp. 165; *Blair v. United States*, 147 Fed. 2d 840, rehearing granted 150 Fed. 2d 676.

In *United States v. Utah Construction Co.*, 86 Sup. Ct. 1545, cited by the Commodity Credit Corporation, the Court stated, at page 1555, that suits on breach of contract, where the contract is terminated, are not in the Wunderlich Act standards:

“Thus the settled construction of the disputes clause excludes breach of contract claims from its coverage whether for purposes of granting relief or for purposes of making binding findings of fact that would be reviewable under Wunderlich Act standards rather than de novo.”

The various decisions relied upon by Commodity Credit Corporation involve appeals by either the Government or the contractor arising from a dispute “under the contract” where the contract was performed and the controversy involved extra work. These cases involve a performed contract under which a dispute arose and not a contract terminated prior to completion for alleged default.

The Wunderlich Act does not change the provisions of the disputes clause in the contract. The Wunderlich

Act uses substantially the same terminology as contained in the disputes clause in referring to “. . . a dispute involving a question arising under such contract”

As the cases clearly state, the purpose of the disputes clause is to resolve expeditiously disputes between the parties under a contract which has been performed. Plaintiff at no time agreed to submit the counterclaim of \$159,967.07 to the Board for decision.

**FINALITY DOES NOT ATTACH TO DECISIONS OF LAW
MADE BY THE CONTRACT DISPUTES BOARD.**

Section 41, United States Code 322, provides that no government contract shall contain a provision making final, on a question of law, the decision of an administrative official. The decision of the Contract Disputes Board is not final in all respects, and the District Court's granting of Summary Judgment in effect holds that neither a factual nor a legal issue exists. It is submitted that even under the Wunderlich Act a party is entitled to a trial on the merits, at which time the record of the administrative agency must be reviewed on all legal issues. The District Court has limited its decision to a finding that the Board's decision is supported by substantial evidence as was not procured by fraud, but has not reviewed the legal basis for the decision itself. The application of the proper measure of damages is a question of law to be decided by this Court and as to which no decision of the Disputes Board is final.

The findings of fact of the original Decision are:

“After review and due consideration of the record the Board finds as follows:

1. The appeal was timely filed.
2. CCC by delivery of wheat to Petitioner before performance security had been furnished did not in so doing lose its right to subsequently demand such security.
3. CCC did not wrongfully reject bulgur tendered to it even though on the basis of subsequent tests it later accepted most of such bulgur.
4. CCC did not by any wrongful action make it impossible for Petitioner to furnish performance security.”

The third alleged Finding of Fact is that the Commodity Credit Corporation did not wrongfully reject bulgur tendered to it even though on the basis of subsequent tests it later accepted most of such bulgur. This is not a finding of fact but a conclusion of law, and even under the Wunderlich Act the Court is not bound by any conclusions of law. If the bulgur was ultimately found to be acceptable, the original rejection of it must have been wrongful. We are not necessarily dealing here with the question of whether the bulgur which was ultimately accepted was suitable or not; that would be a factual issue. Once it is determined, after testing, that the bulgur was properly made and accepted, then the prior rejection of it must have been wrongful. Similarly, whether the Commodity Credit Corporation lost its right to subsequently demand performance security by undertaking delivery under the contract is a question of law, not a

factual issue. The mere fact that a legal issue is labeled under the heading "Findings of Fact" does not make it any less a legal issue. The Decision of the Contract Disputes Board as to whether the Contracting Officer was "legally justified in terminating Petitioner's right to proceed under the contracts" is a question of law and under 41 USC 22 is not binding on the Court. The District Court restricted its decision to a limited review under the Wunderlich Act, while Plaintiff is at the very least entitled to a review of the record de novo on all legal issues under 41 USC 22, and the Summary Judgment on the question of whether there is substantial evidence to support the findings of the Board does not constitute a decision on the legal questions which were before the Board. The propriety of the Board's decision allowing the filing of a counterclaim of \$159,967.07 during the hearing itself is a legal issue subject to judicial review.

CONCLUSION

Plaintiff's suit for breach of contract is clearly not under the Wunderlich Act because it does not involve a claim against the Commodity Credit Corporation "under the contract," but is a suit for breach of a terminated contract. Accordingly, the Appellant should be allowed a trial de novo on its action for damages, and in addition upon the counterclaim. Commodity Credit Corporation in effect has secured a \$159,967.07 judgment against Fishel Products Company on a demand that was not even presented prior

to the hearing before the Contract Disputes Board, and upon which the Plaintiff and Appellant did not have an opportunity to prepare for its presentation, and even when first presented was not accepted by the Hearing Officer as a basis for the litigation. Commodity Credit Corporation feels the procedure followed was an expeditious way of disposing of this claim, and while it may be a "small" amount to Commodity Credit Corporation in view of the huge sums with which it generally deals, Appellant should not be legally liable under the general guidelines of due process to have judgment of \$159,967.07 rendered against it by an arbitrary act of expediency on the part of the Contract Disputes Board. The failure to give Appellant's counsel notice of the counterclaim and an opportunity to prepare for it and to have evidence produced in an open hearing, constitutes an arbitrary and capricious act and violates due process. Even if the Wunderlich Act applied, with regard to restricting the Court's ability to determine de novo factual issues, the rendering of a \$159,967.07 judgment under the procedure followed by the Board is arbitrary and capricious, such as to imply bad faith.

Since the Summary Judgment was rendered on the basis that all of the proceedings before the Contract Disputes Board are final, the Judgment should be reversed, and the case should be set for trial on the merits. Appellant is entitled to a judicial determination of any legal issue before the Board, which the District Court did not do in granting Summary Judgment. As the Declaration of John D. Fishel indicates,

Appellant also is entitled to a trial on certain of the factual issues pertaining to the Cross-Complaint and the measure of damages which was asserted. The issue of whether the Commodity Credit Corporation was entitled to terminate the contract is a legal one and upon which the Court should rule in a trial on the merits.

For the foregoing reasons it is respectfully submitted that the Summary Judgment should be reversed.

Dated, Fresno, California,
May 22, 1968.

Respectfully submitted
CREEDE, DAWSON & GILLASPY,
By FRANK J. CREEDE, JR.,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK J. CREEDE, JR.,
Attorney for Appellant.

